Supreme Court, U.S.
FILED
APR 29 1994
OFFICE OF THE CLERK

No. 93-892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NTA GRAPHICS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

TIMOTHY C. MCCARTHY *
SHUMAKER, LOOP & KENDRICK
North Courthouse Square
1000 Jackson
Toledo, OH 43624-1573
(419) 241-9000

JOSEPH R. DAMATO
LAWRENCE P. POSTOL
RONALD A. LINDSAY
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 500
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4004
(202) 463-2400
Counsel for Petitioner

* Counsel of Record

Dated: April 29, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

33 pp

QUESTIONS PRESENTED *

1. In crafting an appropriate bargaining unit in a lithographic printing operation should the National Labor Relations Board be permitted to depart without explanation from its established rule that all employees engaged in the lithographic production process form a cohesive unit and that a unit limited to pressroom employees is inappropriate?

2. Is an agency decision arbitrary, capricious and an abuse of discretion when the agency fails to explain the basis for its decision, particularly when it ignores its own long-standing precedent?

3. Can an agency issue a decision which fails to disclose the basis for its departure from prior precedent, and thus effectively preclude judicial review?

---

* All of the parties to the proceeding below are listed in the caption of this case. NTA Graphics, Inc., has no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	9
ARGUMENT	10
THE BOARD'S ORDER CANNOT BE ENFORCED BECAUSE THE BOARD'S UNIT DETERMINATION CANNOT BE RECONCILED WITH ITS PRIOR RULINGS AND THE BOARD OFFERED NO EXPLANATION FOR ITS INCONSISTENCY	10
A. The Board's Unit Determination In This Case Cannot Be Reconciled With Its Prior Rulings	11
B. The Board Did Not Satisfy Its Obligation To Provide A Reasoned Explanation For Its Decision	19
C. No Bargaining Order Should Be Enforced Against The Company	25
CONCLUSION	27

TABLE OF AUTHORITIES

Cases: Page

Aeronautics Corp. of America, 210 N.L.R.B. 650 (1974) 13
Allen, Lane & Scott, 137 N.L.R.B. 223 (1962) 20, 21
American Hospital Ass'n v. NLRB, 499 U.S. 606 (1991) 9, 12, 16
Atchison, T. & S.F.R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973) 10, 22
Bowen v. American Hospital Ass'n, 476 U.S. 610 (1986) 9, 21, 22
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 21
Calco Plating, Inc., 242 N.L.R.B. 1364 (1979) 19
Check Printers, Inc., 204 N.L.R.B. 303 (1973) 13
Columbia Broadcasting Sys. v. FCC, 454 F.2d 1018 (D.C. Cir. 1971) 23
Continental Web Press, Inc., 262 N.L.R.B. 1395 (1982), *enf. denied*, 742 F.2d 1087 (7th Cir. 1984) 8, 10, 14-15, 16, 22, 24, 26
District Lodge 91, IAM v. NLRB, 814 F.2d 876 (2d Cir. 1987) 26
Earl Litho Printing Co., 116 N.L.R.B. 1538 (1956) 13
Greater Boston Television Corp., 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) 22
Hampton Roads Broadcasting Corp., 100 N.L.R.B. 238 (1952) 13
International Ass'n of Bridge Workers v. NLRB, 792 F.2d 241 (D.C. Cir. 1986) 25
Kalamazoo Paper Box Corp., 136 N.L.R.B. 134 (1962) 12
Magnesium Casting Co. v. NLRB, 401 U.S. 137 (1971) 16
Manz Corp., 79 N.L.R.B. 211 (1948) 9, 13
Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) 11
Meredith Publishing Co., 140 N.L.R.B. 509 (1963) 14
Moore Business Forms, Inc., 216 N.L.R.B. 833 (1975) 16, 17, 18
Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983) 9, 21, 22-23

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Action Automotive, 469 U.S. 490 (1985)	9, 12, 20
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)	10
NLRB v. Brown Food Store, 380 U.S. 278 (1965)	23
NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990)	19, 20
NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944)	24
NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965)	12, 19, 24, 25-26
NLRB v. Weingarten, 420 U.S. 251 (1975)	10
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969)	10, 24, 26
NLRB v. Yeshiva University, 444 U.S. 672 (1980)	9, 11, 21, 22, 24
Perry Broadcasting, Inc., 300 N.L.R.B. 1140 (1990)	13
Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)	19-20
Phoenix Resort Corp., 308 N.L.R.B. 826 (1992)	19
R.W. Nowels, 219 N.L.R.B. 222 (1975)	17
SEC v. Chenery Corp., 318 U.S. 80 (1943)	12
Typecraft Press, Inc., 275 N.L.R.B. 553 (1985)	13, 17, 18, 19
UAW v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972)	26
United States v. Chicago, M. St. P. & P.R. Co., 294 U.S. 499 (1935)	22
Virginia Mfg. Co., 311 N.L.R.B. 992 (1993)	19
Western Electric Co., 268 N.L.R.B. 351 (1983)	13
White Sulphur Springs Co., 85 N.L.R.B. 1487 (1949)	24
Winchell Co., 305 N.L.R.B. 903 (1991), *enf'd mem.* 977 F.2d 570 (3d Cir. 1992)	14
Yellow Taxi Co. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983)	16
Young & Selden Co., 147 N.L.R.B. 67 (1964)	13

Statutes:

5 U.S.C. § 557	4, 22
5 U.S.C. § 706	4, 22

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1254(1)	2
29 U.S.C. § 158	2-3, 8
29 U.S.C. § 159	3, 9, 11
29 U.S.C. § 160	3, 8
Other Authorities:	
Aristotle, *Nicomachean Ethics*	25
Patrick Hardin, *The Developing Labor Law* (3d ed. 1992)	11
Douglas L. Leslie, *Labor Bargaining Units*, 70 Va. L. Rev. 353 (1984)	11
Ursula M. McDonnell, Comment, *Deference to NLRB Adjudicatory Decision Making: Has Judicial Review Become Meaningless?* 58 U. Cin. L. Rev. 653 (1989)	24
Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 Yale L.J. 982 (1980)	24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-892

NTA GRAPHICS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Sixth Circuit, issued on June 21, 1993, is reproduced beginning at App. A1.[1]

On August 19, 1987, a Regional Director of the National Labor Relations Board issued a decision directing a union representation election in a bargaining unit limited to pressroom employees. The Regional Director's decision is reproduced beginning at App. A15.

The September 25, 1987 order of the National Labor Relations Board denying the petitioner's request for re-

---

[1] References herein shall be in accordance with the following convention: pages in the Appendix to the Petition for a Writ of Certiorari will be referenced as "App. ——;" pages in the Joint Appendix will be referenced as "J.A. ——."

view of the bargaining unit determination in the representation proceeding is reproduced at App. A13. The July 24, 1992 decision and order of the National Labor Relations Board in the subsequent unfair labor practice proceeding is reported at 307 N.L.R.B. No. 224 and is reproduced beginning at App. A5.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 21, 1993. A petition for rehearing was denied on August 23, 1993. An order signed by Justice John Paul Stevens on November 15, 1993 extended to December 6, 1993 the time to file a petition for a writ of certiorari. The petition was filed on that date.

STATUTES INVOLVED

Relevant portions of Sections 7-10 of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. §§ 157-60, are set forth below:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency. . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

. . . .

(e) The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

The relevant portions of 5 U.S.C. § 557(c), the Administrative Procedure Act, are set forth below:

> All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record. . . .

The relevant portions of 5 U.S.C. § 706, the Administrative Procedure Act, are set forth below:

> The reviewing court shall—
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . . .
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> . . . .
>
> (E) unsupported by substantial evidence. . . .

STATEMENT OF THE CASE

In this proceeding, the United States Court of Appeals for the Sixth Circuit enforced an order of the National Labor Relations Board ("Board") holding that a unit composed solely of the pressroom employees of a lithographic printer is an appropriate unit for collective bargaining. The Board's ruling deviated without explanation from its prior bargaining unit determinations in this industry.

Petitioner NTA Graphics, Inc. ("Company"), is a commercial printer whose single product is advertising inserts

for grocery stores (J.A. 27). The advertisements, which eventually are inserted into newspapers, are printed on a standard four-color offset web press (J.A. 66, 70). The Company is not involved in technically advanced press operations (J.A. 38).

All employees at the Company's single plant are involved, directly or indirectly, in the production of the advertising inserts. The order in which projects are completed is determined by the Plant Superintendent, who has supervisory responsibility for all production employees (J.A. 29, 34-35). In the course of producing the inserts, there is contact and communication between employees in the pressroom and employees whose work precedes and follows the work in the pressroom. Contact between employees in the Press Department and employees in the Pre-Press Department is especially frequent since pressroom work follows sequentially from the work in the Pre-Press Department (J.A. 48-49).

Any project received from one of the Company's grocery clients begins with copy provided by the customer. The project then proceeds to the Composition Department, which prepares job tickets instructing all departments on how the job should be performed. These job tickets are then personally distributed to all the other departments. The Composition Department consults with the Pre-Press Department on color and configurations, spending some one to five hours per day in discussion. It also instructs the Press Department on paper size and quantities. The Shipping/Receiving Department is given directions on the timing and destination of shipments (J.A. 27-28, 164).

After the project leaves the Composition Department, it proceeds to the Pre-Press Department, where cameramen photograph the copy. Strippers in the Pre-Press Department take the photographic flats, separate the colors and then organize the pages in accordance with instructions provided by the Composition Department.

Platers prepare and proofread plates, and these plates are then assembled and organized, with skid labels and bundle tags prepared by the Composition Department attached (J.A. 28-29).

Once the plates become available, employees in the Press Department obtain these plates from the Pre-Press Department, hang them in accordance with instructions on the job ticket prepared by the Composition Department, and begin printing. The first readable copy is proofread by the pressman against the Composition Department's job tickets to ensure the pagination is correct. An initial readable copy is also taken back to the Pre-Press Department for proofreading to make sure it conforms to the customer's original copy (J.A. 29-30, 48-49).

The pressman is assisted by a jogger, who, in addition to providing miscellaneous help, takes the printed product off the end of the press and sweeps up around the press. The Company usually selects its pressmen from the ranks of the joggers (J.A. 32, 83).

The functional integration of the production process is mirrored by the similarity in wages, benefits and working conditions enjoyed by all of the Company's non-managerial employees. All such employees are hourly employees who punch the same time clock, receive the same fringe benefits (vacation, life insurance and health insurance) and are subject to the same disciplinary rules and procedures. Although within each department individual employees are paid at different wage rates, the range of these rates differs little from department to department. For example, the range of wage rates for employees in the Pre-Press Department is from $4.90 to $9.25 per hour whereas the employees in the Press Department receive from $3.85 to $9.00 per hour (J.A. 52). Furthermore, all non-managerial employees are subject to the same overtime assignment and compensation programs and receive the same shift premium (J.A. 47-48, 57-62).

At the time of hire, none of the Company's non-managerial employees are required to meet any specialized experience or education requirements (J.A. 38). Most of the Company's employees learn on the job. For example, in the pressroom eight of the eleven pressmen are considered trainees, *i.e.*, they have less than three years of experience (J.A. 79, 153, 189).

On June 12, 1987, the Graphic Communications International Union, Detroit/Toledo/Lansing Local 289, AFL-CIO-CLC ("Union"), filed a petition with the Board seeking to represent some of the Company's employees in collective bargaining. The Union originally petitioned for a unit consisting of the employees in the Pre-Press and Press Departments (*i.e.*, all employees directly involved in lithographic production operations) (J.A. 9-11). After the representation hearing, however, the Union changed its position and sought a unit limited to employees in the pressroom. The Board's Regional Director adopted the Union's suggestion and ordered an election in a unit composed solely of pressroom employees (App. A15).

The Company sought review of the Regional Director's decision, arguing that Board precedent did not permit pressroom employees of a lithographic printer to be isolated in a separate bargaining unit. The Board denied the Company's request for review in a split decision. Although the Board acknowledged that a unit composed solely of pressroom employees was not "traditional" in the industry, it endorsed the Regional Director's determination that the pressroom employees had a "distinct community of employment interests" (App. A27) through the conclusory statement that there was "insufficient evidence of cohesiveness between the preparatory employees and pressroom employees to warrant a broader unit" (App. A13).[2] Other than noting that the Company

[2] "Preparatory employees" refers to those employees who prepare the materials to be printed. In the context of this case, the employees in the Company's Pre-Press Department would undoubtedly be regarded as preparatory employees.

had asked for "an all-employee unit, not one limited to lithographic production employees" (App. A13), the Board provided no other reason for departing from its long-established rule in the industry. Member Stephens dissented from the Board's disposition, reasoning that the Board should consider the decision in *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984), in which the Seventh Circuit denied enforcement to a similar Board order (App. A14).

The Union prevailed in the representation election held in the pressroom unit that the Board had created and was certified as the exclusive representative of the pressroom employees (J.A. 340). After the Company engaged in a technical refusal to bargain with the Union, an unfair labor practice charge was filed and disposed of through summary judgment.[3] The Board, relying on its earlier bargaining unit determination and certification, ordered the Company to engage in collective bargaining with the Union (App. A5). Pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e), the Board petitioned the Sixth Circuit for enforcement of its order.

As indicated, the Sixth Circuit enforced the order. The court of appeals, without addressing the Board's departure from the Board's own precedent in certifying a unit limited to pressroom employees, held that the Board had not abused its discretion. The court speculated that there was enough evidence of dissimilar working conditions for the pressmen "to support a conclusion that the pressmen at the Company enjoy a distinct community of interests" (App. A3).

---

[3] An employer who contests a unit determination can obtain court review of this determination only after an unfair labor practice charge has been filed against him under Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), charging him with a refusal "to bargain collectively with the representatives of his employees."

SUMMARY OF ARGUMENT

This case involves the Board's unexplained departure from its own precedent in the course of making a bargaining unit determination. As with any other administrative agency, the Board has an obligation "to explain the rationale and factual basis for its decision." *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 624 (1986). This is especially true where, as here, the Board has departed from a prior norm. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983). The Board cannot "overrule *sub silentio* [a] body of Board precedent." *NLRB v. Yeshiva University*, 444 U.S. 672, 687 (1980).

After a labor union petitions for the right to represent a group of employees, the Board must define "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). To carry out this statutory responsibility, the Board examines the working conditions of employees to determine whether they "share a community of interest." *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985). Application of the Board's "community of interest" standard takes place against the background of "rules that the Board develops to circumscribe and to guide its discretion either in the process of case-by-case adjudication or by the exercise of its rulemaking authority." *American Hospital Ass'n* v. *NLRB*, 499 U.S. 606, 611-12 (1991).

One such rule the Board has utilized for approximately five decades is the rule that pressmen and preparatory employees who work for lithographic printers should be combined into one bargaining unit. *E.g., Manz Corp.*, 79 N.L.R.B. 211, 212 (1948). In the instant case, however, the Board departed from this time-honored rule without any explanation. The Board's silence is all the more striking because on the only other occasion when the Board failed to follow this rule, the U.S. Court of Appeals for the Seventh Circuit denied enforcement to the

Board's order. *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984). The *Continental Web* court observed that "far from applying settled principles, the Board . . . reversed a long-established presumption in favor of combining pressmen and preparatory employees into a single unit of lithographic production workers." *Id.* at 1092.

As in *Continental Web*, the Board in this case did not deign to give the parties, or the courts, the benefit of its analysis in sharply departing from almost five decades of precedent. This failure to discharge its obligations renders the Board's ruling fundamentally flawed and the Sixth Circuit erred when, after a cursory review, it enforced the Board's order. To conclude otherwise would permit the Board to conceal the reasons for its decisions and altogether preclude meaningful judicial review.

ARGUMENT

THE BOARD'S ORDER CANNOT BE ENFORCED BECAUSE THE BOARD'S UNIT DETERMINATION CANNOT BE RECONCILED WITH ITS PRIOR RULINGS AND THE BOARD OFFERED NO EXPLANATION FOR ITS INCONSISTENCY

This Court has repeatedly upheld the Board's authority to rely on adjudication rather than rulemaking procedures in formulating "agency policies." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969). *Accord NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Furthermore, the Board may alter its policies through adjudication. The "Board's earlier decisions" do not "fr[eeze] the development of . . . national labor law." *NLRB v. Weingarten*, 420 U.S. 251, 265-66 (1975). However, when the Board departs from prior norms, it must clearly explain the reasons for its decision "so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Atchison, T. & S.F.R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973). The Board

cannot "overrule *sub silentio* [a] body of Board precedent." *NLRB v. Yeshiva University*, 444 U.S. 672, 687 (1980). In this case, the Board, operating under a veil of secrecy, has deviated without explanation from its own long-established precedent. As a result, its order constitutes a gross abuse of discretion and should not be enforced.

A. The Board's Unit Determination In This Case Cannot Be Reconciled With Its Prior Rulings

Typically, the issue of which employees, if any, should be aggregated for purposes of collective bargaining arises when a labor union petitions the Board for the right to represent a group of employees. Section 9(b) of the Act directs the Board, in the course of a representation proceeding, to determine "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). The Board's unit determination is critical, not only because it may affect the outcome of the representation election (in determining which employees are to be included in the unit the Board also determines which employees may be eligible to vote), but because "[t]he bargaining unit provides the formal arena of the entire collective bargaining process." Patrick Hardin, *The Developing Labor Law* 448 (3d ed. 1992). For the employees in the designated unit, their labor union acts "as the employees' exclusive bargaining representative." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944). As one commentator has observed, "[b]argaining unit configuration is an important element in the labor law regulatory scheme . . . [a] unit configuration may have decisive effect on a union's power, on the nature of the goods the union seeks to secure, and on the distribution of those goods." Douglas L. Leslie, *Labor Bargaining Units*, 70 Va. L. Rev. 353 (1984).

The Board's discretion in determining appropriate bargaining units is broad, but it is neither unlimited nor unreviewable. *Yeshiva University*, 444 U.S. at 687-88,

691; *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 441-43 (1965). As this Court has observed, "[t]he Board does not exercise this authority aimlessly." *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985). As does any other administrative agency, the Board provides reasons for its decisions, which reasons not only ensure consistency, but enable the courts to exercise meaningful review of the Board's decisions. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

Because "[a] cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining," the Board's focus in defining bargaining units "is on whether the employees share a 'community of interest.'" *Action Automotive*, 469 U.S. at 494. This standard is not self-defining and cannot be mechanically applied, but the Board, at least theoretically, avoids arbitrary results as its application of the "community of interest" standard is guided "by the rules that the Board develops to circumscribe and to guide its discretion either in the process of case-by-case adjudication or by the exercise of its rulemaking authority." *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 611-12 (1991).

Through adjudication, the Board has developed a list of factors upon which it will focus in deciding whether a group of employees shares a community of interest. These factors include the employees' compensation, benefits, supervision, skills and training, job functions, contact with other employees and the integration of their work functions. *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137-38 (1962). But the Board has gone even further and, to assist it in its statutory duties, it has developed rules pursuant to which certain types of bargaining units will be regarded as presumptively appropriate or presumptively inappropriate. These presumptions not only reduce the Board's administrative burden but also enable employers and unions to predict with greater certainty the likely contours of a bargaining unit. There are many examples of such rules, but a couple will

suffice. Thus, the Board has a rule that "the smallest appropriate unit of technical employees working in similar jobs with similar working conditions and benefits comprises all such technical employees." *Western Electric Co.*, 268 N.L.R.B. 351, 352 (1983). *Accord Aeronautics Corp. of America*, 210 N.L.R.B. 650, 651 (1974). Similarly, the Board has a rule that, in the radio and television industries, "on-air" employees have a distinct community of interest and, therefore, constitute a separate appropriate unit. *E.g., Perry Broadcasting, Inc.*, 300 N.L.R.B. 1140, 1141 (1990); *Hampton Roads Broadcasting Corp.*, 100 N.L.R.B. 238, 239 (1952).

Another rule that the Board has developed through adjudication concerns bargaining units in the lithographic printing industry. For approximately five decades, the Board has followed the rule that pressmen and preparatory employees who work for lithographic printers should be combined into one bargaining unit. *E.g., Typecraft Press, Inc.*, 275 N.L.R.B. 553 (1985); *Earl Litho Printing Co.*, 116 N.L.R.B. 1538, 1539 (1956) ("The Board has consistently held that all employees engaged in the lithographic production process form a cohesive unit for collective-bargaining purposes and has established units which included all such employees, without regard to the specific skills of the employees or the departmental nature of the unit sought."); *Manz Corp.*, 79 N.L.R.B. 211, 212 (1948) ("The Board has repeatedly held that, absent unusual circumstances, all employees engaged in the lithographic process form an indivisible entity for the purposes of collective bargaining.") In the only recognized exception to this rule, the Board will find a plant-wide unit of all production and maintenance employees appropriate where the printer is involved in the production of a single product and the plant-wide unit is of a relatively small size. *E.g., Check Printers, Inc.*, 204 N.L.R.B. 303 (1973).[4] *See also Young & Selden Co.*, 147 N.L.R.B.

[4] Because the Company is likewise engaged in the production of a single product—advertising inserts for grocery stores—and has

67 (1964) (because "imprinting operation is relatively simple . . . only an overall production and maintenance unit . . . is appropriate"). Furthermore, the continuing vitality of the Board's rule does not appear to be in doubt. *See Winchell Co.*, 305 N.L.R.B. 903, 904 (1991), *enf'd mem.*, 977 F.2d 570 (3d Cir. 1992) (certified bargaining unit includes all "lithographic production employees").

In only two cases has the Board departed from this well-settled rule and concluded that a bargaining unit composed solely of pressmen would be appropriate.[5] One case was the instant case and the other was *Continental Web Press, Inc.*, 262 N.L.R.B. 1395 (1982), *enf. denied*, 742 F.2d 1087 (7th Cir. 1984).

In denying enforcement to the Board's order in *Continental Web*, the Seventh Circuit roundly criticized the Board's failure to adhere to its own precedent. The Seventh Circuit pointed out that "far from applying settled principles, the Board . . . reversed a long-established presumption in favor of combining pressmen and preparatory employees into a single unit of lithographic production workers." 742 F.2d at 1092. Moreover, in ignoring its own precedent, the Board "gave no reason why it . . .

---

approximately forty-five employees engaged in production and maintenance (J.A. 32, 188-89), it argued before the Board that the most appropriate unit would be one containing all production and maintenance employees (App. A13). However, the Company also argued that even if the Board did not include all production and maintenance workers in the unit, it would still not be "appropriate to carve out a separate unit for . . . pressmen" (J.A. 334).

[5] In the Board's brief in opposition to the petition for a writ of certiorari, the Board cited *Meredith Publishing Co.*, 140 N.L.R.B. 509 (1963) as another example of the Board's willingness to depart from its traditional rule. Brief in Opposition at 10. However, in that case the Board did *not* certify a unit limited to pressmen. To the contrary, the unit included both pressmen and preparatory employees. *Id.* at 512. The only anomaly in the case resulted from the exclusion of some "paste-up" employees on the ground of their prior representation by a rival union.

thought a separate pressmen's unit appropriate," nor did it "explain why it was not applying its traditional policy toward units of lithographic production workers." *Id.* at 1094. In the Board's opinion, and in the opinion of the Board's Regional Director, mention was made of differences in working conditions between the pressmen and other employees, but there was no discussion of the significance of these differences, either in the abstract or against the backdrop of the Board's traditional rule. In particular, there was no analysis of why these differences destroyed the cohesiveness of the various production employees and required a separate unit for pressmen. To quote the trenchant analysis of the court of appeals, "[t]heir opinions recite the differences in working conditions . . . and then tack on a conclusion that therefore the pressmen have a sufficient community of interest to be a separate unit. We understand everything but the 'therefore.' " *Id.* at 1092.

Similarly, in the instant case, the Board made no attempt to explain its departure from precedent. Indeed, the Board itself offered *no* analysis of the differences between the working conditions for pressmen and for other employees involved in the production process. The Board limited itself to stating that "there is insufficient evidence of cohesiveness between the preparatory employees and pressroom employees to warrant a broader unit" (App. A13). Since employees whose interests are not cohesive are never included in the same bargaining unit, this remark is merely a restatement of the Board's conclusion and, as such, no substitute for reasoned analysis.

The Board advanced from the merely tautological to the palpably irrelevant when it stated, as an additional "reason" for not including the preparatory employees in the bargaining unit, that the "Company contended that the only appropriate unit was an all-employee unit, not one limited to lithographic production employees" (App. A13). The Act does not preclude the Board from finding a particular unit appropriate even though neither the em-

ployer nor the union proposed such a unit. Congress chose to have the Board determine appropriate bargaining units and "not to leave the decision up to employees or employers alone." *American Hospital Ass'n*, 499 U.S. at 606. Certainly, in *Moore Business Forms, Inc.*, 216 N.L.R.B. 833 (1975), the fact that the employer proposed a plant-wide unit and the union proposed a pressroom unit did not present an obstacle to the Board's determination that a traditional unit of "lithographic production employees employed in [the] press and preliminary departments" was appropriate.

The Board's Regional Director did, in his opinion, list several differences in working conditions between pressmen and other Company employees (App. A15-28). However, to begin, the Board did not formally adopt the Regional Director's opinion, and, therefore, it remains unclear whether the Board agreed with whatever the Regional Director offered by way of analysis. *But see Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971) (Board not obligated to give plenary review to Regional Director's unit determination). In any event, the only authority the Regional Director cited to support his conclusion that the differences in working conditions required a unit limited to the pressroom was the Board's flawed decision in *Continental Web* (App. A26). The Regional Director's reliance on *Continental Web*, without even acknowledging the Seventh Circuit's decision not to enforce the Board's order in that case, and the Board's implicit endorsement of that reliance, are nothing short of remarkable. The Board has often declined to acquiesce in appellate decisions from the circuit courts, *see generally Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 381-84 (D.C. Cir. 1983), but the Board in this case has taken this policy of nonacquiescence to new extremes. In effect, the Board has accepted without elaboration a Regional Director's decision based exclusively on a prior Board order that was denied enforcement on the ground that it departed from decades of Board precedent without justifica-

tion. This is rubber-stamping a cross-reference to a nullity.

The infirmity of the Regional Director's decision is further demonstrated by the fact that differences in working conditions that he identified have been expressly rejected by the Board as relevant differences. Thus, the presence of a wall separating the pressroom from other production areas was not regarded as dispositive in *Moore Business Forms, Inc.*, 216 N.L.R.B. 833 (1975), whereas the Regional Director apparently thought it significant in this case (App. A20). (Indeed, the location of the prepress operations and the press operations on "two separate floors" was not regarded as dispositive in *Typecraft Press*, 275 N.L.R.B. at 553). Division of a lithographer's production workers into different departments, including a separate press department, was not considered relevant in *R.W. Nowels*, 219 N.L.R.B. 222 (1975), whereas the Regional Director apparently thought it significant in this case (App. A20). Similarly, in *Moore Business Forms*, the Board did not place any weight on the fact that a pressman was considered fully qualified only after "approximately 3 years [of] training," 216 N.L.R.B. at 833, whereas the Regional Director apparently thought a three-year training period significant in this case (App. A23).[6]

The Regional Director's listing of purportedly relevant differences was no less distant from Board precedent when he expressly attempted to distinguish *Moore Business Forms* (App. A27). According to the Regional Director, in *Moore Business Forms* the traditional unit was appropriate because there was common supervision for pressroom and preparatory employees on two of three shifts whereas in the instant case the pressroom and the prepress area have separate supervisors (App. A22-23, 27).

---

[6] These three factors—the walls separating the pressroom from other work areas, the Company's division into distinct departments and the three-year training period—were the factors the Sixth Circuit emphasized in enforcing the Board's order (App. A3).

However, the record plainly reveals that the night-shift "supervisor" in the pressroom and the "supervisor" in the pre-press area are actually "group leaders," *i.e.*, workers who exercise some supervisory functions but who would be included in the bargaining unit (J.A. 33-37). In *Typecraft Press*, 275 N.L.R.B. at 554, the Board concluded that the fact that the preparatory and pressroom departments had different supervisors—who were called "working forepersons"—was not a fact that destroyed the cohesiveness of the traditional lithographic production unit, even though the working forepersons in that case had enough supervisory authority to be excluded from the bargaining unit. *Id.* at 553 n.5. *A fortiori*, the existence of separate "group leaders" cannot provide a reason for dividing the traditional unit.

The Regional Director's second basis for distinguishing *Moore Business Forms* was that the pressmen and preparatory employees in that case had more contact than could be found in the instant case, in part because in *Moore Business Forms* "[p]reliminary employees were continually in the press area . . . delivering plates" (App. A27). As to this purported distinction, three things can be said. First, as a matter of common sense, in this case there must be contact between the preparatory employees and the pressroom employees: the plates do not walk themselves into the pressroom. Second, the Regional Director conceded at one point in his opinion that "the press operator receives [the plate] from the platemaker" (App. A21).[7] Finally, the Regional Director disregarded an important factor that the Board has emphasized in

---

[7] Curiously, the Regional Director, other than this one passing reference, does not address at all the contacts between the platers and strippers and the pressroom employees, even though he does address the contacts between pressroom employees and employees in all other classifications (App. A21-22). In any event, the record unambiguously confirms that there is repeated daily contact between the pre-press employees and the pressroom employees, principally, but not exclusively, through the transfer of plates (J.A. 48-49).

other cases. Thus, in *Typecraft Press*, the Board pointed out that all bargaining unit employees shared an important interest because they were all required to "punch a timeclock." 275 N.L.R.B. at 554. In this case, all the hourly employees in the Company are required to punch *the same* time clock that is located *in the pressroom* (J.A. 47-48). Thus, the preparatory employees, along with all other employees, must, at a minimum, visit the pressroom four times a day to carry out a function the Board has held significant in other cases.[8]

In sum, factors that were not regarded as relevant in other Board decisions have apparently—and we say apparently because the administrative record requires one to speculate—taken on special meaning in this case while factors regarded as relevant in other Board decisions have been capriciously ignored. If the Board has utilized criteria that could reconcile its decision, and the decision of its Regional Director, with decades of opposing precedent, they have not been disclosed. Such an abuse of the Board's discretion mocks this Court's holdings in *Metropolitan Life* and its progeny.

B. The Board Did Not Satisfy Its Obligation To Provide A Reasoned Explanation For Its Decision

This Court has "accorded Board rules considerable deference." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). The Board is a specialized administrative agency and Congress has invested the Board with wide discretionary authority in adjudicating disputes within its area of expertise. *Phelps Dodge Corp.*

---

[8] To those unfamiliar with bargaining unit determinations, it may appear that punching the same time clock is not an activity that should be a factor in unit determinations. The Board, however, based on its expertise, has often cited the activity of punching the same time clock as a reason for grouping employees together in the same unit. *E.g., Virginia Mfg. Co.*, 311 N.L.R.B. 992, 993 (1993); *Phoenix Resort Corp.*, 308 N.L.R.B. 826, 827 (1992); *Calco Plating, Inc.*, 242 N.L.R.B. 1364, 1365 (1979).

v. NLRB, 313 U.S. 177, 196 (1941). "Furthermore, a Board rule is entitled to deference even if it represents a departure from the Board's prior policy." *Curtin Matheson*, 494 U.S. at 787. No one expects the Board to adhere blindly to its precedent in the face of changed circumstances. "[A]n agency's day-to-day experience with problems is bound to lead to adjustments." *Action Automotive*, 469 U.S. at 495 n.4.

These familiar and uncontroverted propositions have no less application to the rule the Board has adopted with respect to appropriate bargaining units for lithographic printers. If the Board is confronted with changes in the industry that indicate a substantial diminution in the commonality of interest shared by press operators and pre-press employees, then the Board may and should modify its rule. In fact, the Board did at one time consider doing so. In *Allen, Lane & Scott*, 137 N.L.R.B. 223, 225 (1962), a group of employers urged the Board "to reconsider [its] long-standing rules concerning unit determinations in the commercial printing industry." Specifically, the employers contended "that numerous technological developments have caused a shift in the pattern of the industry and resulted in a blending of printing techniques which have almost eradicated those features of lithography distinguishing it from other types of printing." *Id.* As a result, there was no longer a "community of interest among lithographic preparatory and press employees . . . warrant[ing] their inclusion in the same unit." *Id.* The Board, in a well-reasoned opinion, addressed the various changes in the printing industry that had occurred and, after analysis of these changes, concluded "that the evidence does not warrant present reconsideration of the Board's long-standing rules concerning appropriate units in the commercial printing industry." *Id.*

If the Board in the instant case had provided an analysis of the differences in working conditions between prepress and pressroom employees that was even remotely

similar to the type of analysis provided in *Allen, Lane & Scott*, the Company would have no legitimate basis for disputing the Board's determination. But, as indicated, the Board opted for a laconic opinion, utterly devoid of analysis, that was as conclusory as it was brief.

This Court has held that an agency's explanation of the basis for its decision must provide a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). *Accord Bowen v. American Hospital Ass'n*, 476 U.S. 610, 626 (1986); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). It cannot be denied that the Board has made no such "rational connection" in this case because it is not even clear what "facts" it has "found;" the Board failed even to identify the specific dissimilarities in employment conditions it regarded as significant. "[T]he Board's opinion may be searched in vain for relevant findings of fact." *Yeshiva University*, 444 U.S. at 691. Nor did the Board discuss why dissimilarities in working conditions destroyed the "community of interest" between pressroom employees and preparatory employees. As a consequence, the Board's "choice" also remains a mystery. In what other circumstances will the Board conclude that a unit other than the "traditional unit" (App. A13) is appropriate? Only when pressroom employees and preparatory employees have separate supervision? How about separate supervision on one of two shifts? Does it matter whether the pressroom is walled off or on a separate floor or in a separate building? What level of contact between preparatory employees and pressroom employees is necessary to establish a community of interests?

All of these issues, and many others, are left unresolved by the Board's unilluminating fiat. As a result, one can expect little predictability in future bargaining unit determinations in the lithographic printing industry since the Board's criteria for commonality of interest are

not only vague, but the Board has declined to identify which of these criteria are germane in the context of lithographic production units. "The Administrative Procedure Act does not require loquacity," *Continental Web Press*, 742 F.2d at 1092, but in this case the Board has "cross[ed] the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp.*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

Insistence that the Board share with the parties and reviewing courts the rationale for its decision does not impermissibly enmesh the courts in the business of determining appropriate bargaining units. Congress has prudently delegated to the Board this function. However, the courts retain the responsibility for reviewing the Board's determinations to ensure that they are neither arbitrary nor inconsistent with the purposes of the Act. *Yeshiva University*, 444 U.S. at 691; 5 U.S.C. § 706 (2)(A). To enable the courts to carry out their responsibility, the Board must in its decisions state its "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. § 557(c)(3)(A). This Court's "recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though [this Court] show[s] respect for the agency's judgment in both." *Bowen*, 476 U.S. at 627. There can be no meaningful judicial review of an agency's decision if the courts do not "know what a decision means." *United States v. Chicago, M. St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935).

An agency's obligation to explain its decision is heightened when, as here, the agency departs from a "settled course of behavior." *Atchinson, T. & S.F.R. Co.*, 412 U.S. at 807. "[A]n agency changing its course by

rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which [normally] may be required." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. "[W]hen an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." *Columbia Broadcasting Sys. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971). In the absence of an explanation for the agency's change, "effective judicial review would be impractical if not impossible." *Id.* at 1025. A court cannot in good conscience defer to an unexplained agency position if it has been deferring to a contrary agency position for decades.

Judicial review, of course, cannot be carried out by speculating as to what justification the agency could have, would have or should have provided for its decision. One cannot defer to an imagined rationale. Therefore, the Sixth Circuit's generosity was misplaced when it stated that the record revealed enough differences between the working conditions of pressroom employees and the working conditions of other employees "to support *a* conclusion that the pressmen at the Company enjoy a distinct community of interests" (App. A3) (emphasis added). The issue is whether *the* conclusion made in this case, *i.e.*, the Board's unexplained conclusion, enjoyed a rational connection to whatever facts, if any, the Board found. "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50. Accordingly, the Sixth Circuit erred in enforcing the Board's order and this Court should reverse the judgment of the court of appeals.

It only remains to point out that the Board's reliance on case-by-case adjudication does not render its decision in the instant case, or in similar cases, "immune from judicial examination." *NLRB v. Brown Food Store*, 380

U.S. 278, 290 (1965).[9] "Subject to the qualified role of *stare decisis* in the administrative process," *Wyman-Gordon*, 394 U.S. at 766, the Board may develop, and has developed, policies through adjudication that serve as precedents. Certainly, the Board, from its earliest days, has regarded itself as obliged to respect its prior decisions. *See, e.g., White Sulphur Springs Co.*, 85 N.L.R.B. 1487, 1488 (1949) ("We can find no adequate reason to depart from a practice adhered to administratively by our predecessors and ourselves since 1935.") Precedents on the subject of bargaining unit determinations are as significant as precedents on other legal issues within the Board's purview and they cannot be abandoned or modified without explanation. *Yeshiva University*, 444 U.S. at 685, 687, 691; *Metropolitan Life Ins. Co.*, 380 U.S. at 442-43. *Accord Continental Web Press*, 742 F.2d at 1093. The Board is free to consider its precedents and conclude they are unwise or not as generally applicable as previously thought, but the Board cannot pretend they do not exist.

Accordingly, any argument to the effect that the Board's decision in this case must be enforced because there is a "need for flexibility in shaping the unit to the particular case," *NLRB v. Hearst Publications, Inc.*, 322

---

[9] Some commentators have suggested that the Board has almost invariably utilized adjudication to develop its policies instead of exercising its nearly dormant rulemaking powers because reliance on adjudication makes the Board's decisions less amenable to judicial review. Ursula M. McDonnell, Comment, *Deference to NLRB Adjudicatory Decision Making: Has Judicial Review Become Meaningless?* 58 U. Cin. L. Rev. 653, 658 (1989) (contending that "the most important feature of adjudication is that it allows the Board to ignore its own precedents"); Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 Yale L.J. 982, 990 (1980) (observing that an "advantage of adjudication is that it permits the agency to make policy decisions in the guise of fact determinations" thereby increasing the "likelihood of judicial acquiescence"). The Board, however, has never argued that it has sought, or that it has a right to seek, to minimize judicial scrutiny of its decisions.

U.S. 111, 134 (1944), rests on an erroneous premise. The Company does not dispute that circumstances may arise that require a departure from Board precedent, even a Board precedent as time-honored as the one in the instant case. It is a truism that has been recognized at least since Aristotle that the law is not a purely deductive system and general rules may have to be modified to fit the case at hand. Aristotle, *Nicomachean Ethics*, V. x. One can conceive of situations in which there would be a significant disparity of interests between preparatory employees and pressroom employees, and in such situations the Board could, through reasoned analysis, explain why it is declining to follow precedent. A reflective modification of precedent is not what the Board carried out in this case, however. Stating that these two groups of employees are not cohesive because the record shows "insufficient evidence of cohesiveness" (App. A13) comes perilously close to a parody of reasoned analysis.

The requirement in the Administrative Procedure Act that the agency provide an explanation for its decision not only enables the courts to engage in meaningful review, but it also "impose[s] a discipline upon the agency itself, assuring that it has undergone a process of reasoned decision-making rather than haphazardly reached a result that could (on one or another basis of analysis) be sustained." *International Ass'n of Bridge Workers v. NLRB*, 792 F.2d 241, 247 (D.C. Cir. 1986). To reverse the judgment of the court of appeals, with the direction that enforcement of the Board's order be denied, implies no invasion of the Board's domain. The Court will not usurp the Board's authority by reminding it that it must discharge its statutory responsibilities.

C. No Bargaining Order Should Be Enforced Against The Company

When an agency fails to provide an explanation for its decision, the usual remedy is to remand the case to the agency "for further proceedings." *Metropolitan Life Ins.*

Co., 380 U.S. at 444. Nevertheless, in some circumstances, "remand would be an idle and useless formality." *Wyman-Gordon*, 394 U.S. at 766 n.6.

This case presents such a circumstance. The Board has in effect twice passed on the opportunity to explain why it believes it should abandon its traditional rule regarding bargaining units in the lithographic printing industry, once in *Continental Web* and once in the instant case. Three bites at the apple would be excessive. *See UAW v. NLRB*, 459 F.2d 1329, 1347 (D.C. Cir. 1972) (court specifies disposition of case instead of allowing Board a third opportunity to ignore precedent). Based on the Board's own precedent, a bargaining unit limited to the pressroom was inappropriate, and there is no need to remand to the Board for a restatement of the applicable law. *E.g., District Lodge 91, IAM v. NLRB*, 814 F.2d 876, 882 (2d Cir. 1987) (when a case has been decided on the basis of an uncomplicated factual record and the applicable legal principles are clear, there may be "no reason to remand for reconsideration.").

At a minimum, if the case is remanded to the Board, it should be remanded with instructions that, whatever the Board's bargaining unit determination, the Board not issue an order requiring the Company to bargain with the Union, absent a new representation election. It has been nearly seven years since the initial representation election was held (J.A. 338). Given the passage of time, a Board order requiring the Company to bargain with the Union "would . . . be subject to the objection that it might force the company to negotiate with a union not supported by a majority of the workers in the bargaining unit." *Continental Web*, 742 F.2d at 1095. Accordingly, a bargaining order would not effectuate the policies of the Act.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

TIMOTHY C. MCCARTHY *
SHUMAKER, LOOP & KENDRICK
North Courthouse Square
1000 Jackson
Toledo, OH 43624-1573
(419) 241-9000

JOSEPH R. DAMATO
LAWRENCE P. POSTOL
RONALD A. LINDSAY
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 500
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4004
(202) 463-2400
Counsel for Petitioner

Dated: April 29, 1994

* Counsel of Record